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Happy Families - Translating Positive Psychology into Family Law

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HAPPY FAMILIES? TRANSLATING POSITIVE PSYCHOLOGY INTO FAMILY LAW

Clare Huntington*

ABSTRACT

Despite the well-documented finding in the field of positive psychology that close interpersonal relationships are significantly correlated with subjective well-being and thriving communities, scholars have yet to bring together positive psychology and family law. And what is family law if not the law of close interpersonal relationships? Positive psychology and related work have the potential to inform the what, the why, and the how of family law, but realizing the potential of positive psychology as a guide for family law involves challenges. In particular, it requires translating the descriptive science of psychology into the prescriptive policies of family law. This Essay addresses this translation question by exploring the indeterminacies inherent in positive psychology and identifying productive ways forward.

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I. INTRODUCTION

Through family law, the state influences nearly every aspect of familial life, from family formation and dissolution to the creation of social norms governing familial behavior.¹ The state wields this influence based on contested ideals about what should constitute a family and how families should operate.² The central normative question that family law raises, then, is what should guide the state's conception of families and family life. In answering this question, family law scholars and policymakers draw upon a variety of sources, including moral philosophy, various psychological theories, and historically contingent social and cultural values.

This Essay approaches the normative question by asking what it would mean if the significant psychological literature on the importance of relationships informed the state's regulation of families. Positive psychology researchers have generated much of this literature in their focus on human flourishing, as have other psychology scholars who may not self-identify as positive psychologists but who nonetheless study the positive aspects of human relationships.³

This Essay contends that positive psychology—broadly defined to include both types of work—holds enormous potential to guide family law.⁴ In drawing upon positive psychology, however, an important first step is to address the meta-question of how best to translate a body of

¹ Some readers may resist the idea of pervasive familial regulation. To be sure, in the United States, the role of the state in regulating families may be less transparent than elsewhere, *see, e.g.*, Sara Rhodin, *A Holiday and a Park Bench From Russia With Love*, N.Y. TIMES, July 9, 2008 at A14 (describing Russia's efforts to stem its population loss, including a "Family Contact Day," when Russians were encouraged "to stay home and engage in marital intimacy in the hopes of producing children on Russia Day, nine months later" and further describing the installation of curved park benches that "encourage[] couples to slide closer together"), but state regulation permeates nearly all aspects of family life, *see infra* text accompanying notes 128-131; *see also* Clare Huntington, *Family Law's Textures* (February 20, 2009) (manuscript on file with author).

² *See* Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 496-98 (1992) (contending that family law has five functions, including the expressive function, which is the power of the law, through words and symbols, to give voice to individuals and also to alter the behavior of individuals regulated by the law, and the channeling function, which is the power to steer individuals into familial institutions deemed desirable by the state).

³ *See infra* Part I.A.

⁴ I am currently engaged in just such a project. *See* CLARE HUNTINGTON, *FLOURISHING FAMILIES: POSITIVE PSYCHOLOGY AND CONTEMPORARY FAMILY LAW* (Oxford University Press) (manuscript in progress).

scientific research into public policies, which are typically an amalgam of theory put into practice, social and cultural values, and political compromise. This Essay explores two aspects of this translation question: first, how to develop public policy when the underlying literature is descriptively indeterminate, and second, how to develop public policy when the underlying literature is normatively indeterminate. This exercise is relevant to most interdisciplinary research but is particularly important if we are to take advantage of the tremendous wealth of knowledge and research that scholars of positive psychology are generating—nearly all of which is highly relevant to family law.

This Essay proceeds in two parts. Part I provides a sense of the potential positive psychology holds for the formulation of family law. It begins with a brief background on positive psychology, presents the argument that family law currently has a negative orientation, and then provides an overview of how positive psychology might change that orientation. Part II tackles the translation question by exploring the twin indeterminacies and identifying productive ways forward. The Essay concludes with several observations about the value of probing the intersection of positive psychology and family law despite the inherent challenges.

II. POSITIVE PSYCHOLOGY AND FAMILY LAW

Positive psychology is “the scientific study of the strengths and virtues that enable individuals and communities to thrive”⁵—in short, the rigorous study of human flourishing.⁶ This relatively new field provides a set of tools to think about the relationship between the state and families. A well-documented finding in positive psychology is that close interpersonal relationships are significantly correlated with subjective well-being⁷ and a host of desirable outcomes on a societal level, from greater civic engagement to thriving communities.⁸

⁵ U. PA., POSITIVE PSYCHOL. CTR., <http://www.ppc.sas.upenn.edu> (last visited Feb. 3, 2009).

⁶ Martin E.P. Seligman & Mihaly Csikszentmihalyi, *Positive Psychology: An Introduction*, 55 AM. PSYCHOLOGIST 5, 5 (2000). Flourishing is not a new concept, nor is it unique to psychology. For example, moral philosophers have developed an extensive literature on flourishing. See, e.g., MARTHA NUSSBAUM & AMARTYA SEN, THE QUALITY OF LIFE (Martha Nussbaum & Amartya Sen eds., 1993); MARTHA NUSSBAUM, FRONTIERS OF JUSTICE (2006); AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999); AMARTYA SEN, RATIONALITY & FREEDOM (2002).

⁷ Numerous studies have established the correlation between positive relationships and subjective well-being. For an overview of this research, see CHRISTOPHER PETERSON, A PRIMER IN POSITIVE PSYCHOLOGY 249-71 (2006) (describing correlation of close relationships with friends, co-workers, and

To be sure, positive psychology scholars did not discover the importance of relationships to subjective well-being. Psychologists have long studied relationships and well-being, focusing on the positive aspects of relationships such as the capacity to love and forgive.⁹ Positive psychology, then, provides both an analogy for how family law can move forward—to help families flourish, not simply respond to ruptures—as well as a point of entry into the vast literature on relationships. This Essay uses the term positive psychology broadly to include the work of scholars who self-identify as positive psychologists as well as the work of those scholars who do not self-identify as such, but whose research is nonetheless deeply relevant.

Family law scholars have yet to draw upon the growing insights of positive psychology,¹⁰ which is surprising, to say the least, because what

romantic partners with subjective well-being; further noting that these relationships are characterized as reciprocal, sustained, and reflecting positive emotions); Harry T. Reis & Shelly L. Gable, *Toward a Positive Psychology of Relationships*, in FLOURISHING: POSITIVE PSYCHOLOGY AND THE LIFE WELL-LIVED 129-31 (Corey L.M. Keyes & Jonathan Haidt eds., 2003) (describing research on correlation between close relationships and subjective well-being); David Myers, *The Funds, Friends, and Faith of Happy People*, 55 AM. PSYCHOLOGIST, 56, 61-63 (2000) (on subjective well-being). Relationships that are not mutually supportive, however, are negatively correlated with subjective well-being. See PETERSON, *supra*, at 266 (describing research showing that “bad friends” have a greater negative impact on well-being than the positive impact of “good friends”); Reis & Gable, *supra*, at 129-52 (describing the difference between bad relationships and good relationships and arguing that the two are functionally independent).

⁸ See U. PA., POSITIVE PSYCHOL. CTR., *Positive Psychology Network Concept Paper: The Positive Community*

<http://www.ppc.sas.upenn.edu/ppgrant.htm#Node3> (describing the influence of community level institutions, such as schools and legislative bodies, on individual well-being by increasing subjective well-being and allowing people to use their character strengths; further describing the role individuals play in making these bodies function).

⁹ See generally Roy F. Baumeister & Mark R. Leary, *The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 PSYCHOL. BULL. 497 (1995) (reviewing the literature on the central importance of human relationships).

¹⁰ Legal scholars in fields other than family law have begun to examine how positive psychology might influence other areas of the law. See, e.g., Peter H. Huang, *Authentic Happiness: Self-Knowledge, and Legal Policy*, 9 MINN. J. L. SCI. & TECH. 755, 773-83 (2008) (proposing that a goal of legal policy should be to “help individuals achieve not only a hedonic sense of happiness, but also to foster individual fulfillment, growth, meaning, and purpose” and that it can do so through funding research, dissemination of research findings, as well as more interventionist methods such as subsidizing certain activities; further arguing that policymakers should promote authentic happiness because it “is a public good that generates positive externalities, such as health, and because

is family law if not the law of close interpersonal relationships?¹¹ To lay the groundwork for examining family law and positive psychology together, this Part briefly describes positive psychology, argues that family law suffers from a negative orientation, and ends with an overview of the tremendous potential positive psychology holds for the development of family law.

A. POSITIVE PSYCHOLOGY, IN BRIEF

Since at least World War II, psychology has largely worked within a disease model of identifying and treating human pathology.¹² More recently, however, psychologists have made a concerted effort to make psychology more inclusive. In 1998, Martin Seligman, then president of the American Psychological Association, called for a new orientation for psychology—“to catalyze a change in the focus of psychology from preoccupation only with repairing the worst things in life to also building positive qualities.”¹³ The animating proposition of positive psychology is that it is possible to measure, understand, and build upon the conditions that lead to human flourishing.¹⁴

To this end, scholars investigate flourishing on three levels—positive subjective experiences, positive individual traits, and positive institutions.¹⁵ On the subjective level, scholars focus on positive experience, including what it is to feel optimistic, experience flow, and be fulfilled. On the individual level, scholars research various character strengths, such as resilience, leadership, courage, the capacity to love and forgive, and interpersonal skills. On the group or institutional level, scholars explore the civic virtues and institutions (such as families, schools, and businesses) that help create thriving communities and societies, examining responsibility, altruism, civility, moderation, and

some aspects of happiness involve coordination problems, such as good transportation and jobs close to home).

¹¹ Although it governs many close interpersonal relationships, there are notable omissions, such as friends, see Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 190 (2007), and nonparental or parent-like caregivers, Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 387-88 (2008).

¹² Seligman & Csikszentmihalyi, *supra* note 6, at 5 (“Psychology has, since World War II, become a science largely about healing. It concentrates on repairing damage within a disease model of human functioning.”).

¹³ See *id.*

¹⁴ *Id.*

¹⁵ *Id.* See PETERSON, *supra* note 7, at 20. As Peterson describes it, “[p]ositive institutions facilitate the development and display of positive traits, which in turn facilitate positive subjective experiences.” See also Christopher Peterson & Nansook Park, *Positive Psychology as the Evenhanded Positive Psychologist Views It*, 14 PSYCHOL. INQUIRY 143, 143-46 (2003). 389 2008-2009

good parenting in these group settings.¹⁶ The field of positive psychology is self-consciously rigorous, seeking to build an empirically based understanding of the conditions and dynamics surrounding human flourishing.¹⁷

Positive psychology scholars do not deny the importance of studying disease and pathology. Rather, they believe this should not be the sole focus of psychology and that researchers also should seek to understand how to encourage and build strengths and virtue.¹⁸ Further, positive psychology is not the glib study of happiness¹⁹ but rather the study of what makes life worth living, which involves far more than fleeting, superficial happiness.²⁰ Indeed, flow and fulfillment can come from somewhat unpleasant experiences.²¹ Seligman's formulation of happiness is that of "authentic happiness," by which he means a combination of pursuing pleasurable feelings, using character strengths to be engaged, and serving a larger purpose.²² Finally, positive

¹⁶ As Martin Seligman describes the three levels of inquiry:

The field of positive psychology at the subjective level is about valued subjective experiences: well-being, contentment, and satisfaction (in the past); hope and optimism (for the future); and flow and happiness (in the present). At the individual level, it is about positive individual traits: the capacity for love and vocation, courage, interpersonal skill, aesthetic sensibility, perseverance, forgiveness, originality, future mindedness, spirituality, high talent, and wisdom. At the group level, it is about the civic virtues and the institutions that move individuals toward better citizenship: responsibility, nurturance, altruism, civility, moderation, tolerance, and work ethic.

Seligman & Csikszentmihalyi, *supra* note 6, at 5.

¹⁷ See *id.* To this end, positive psychology employs the same methodologies already used in psychology but simply directs these methodologies to a new focus—what makes life worth living. See PETERSON, *supra* note 7, at 18.

¹⁸ See Seligman & Csikszentmihalyi, *supra* note 6, at 13.

¹⁹ Seligman and Csikszentmihalyi describe happiness as a colloquial term for subjective well-being. See *id.* at 9.

²⁰ See PETERSON, *supra* note 7, at 7.

²¹ One of the topics positive psychologists study is the difference between pleasure and enjoyment. See Seligman & Csikszentmihalyi, *supra* note 6, at 12 ("Pleasure is the good feeling that comes from satisfying homeostatic needs such as hunger, sex, and bodily comfort. Enjoyment, on the other hand, refers to the good feelings people experience when they break through the limits of homeostasis—when they do something that stretches them beyond what they were—in an athletic event, an artistic performance, a good deed, a stimulating conversation. Enjoyment, rather than pleasure, is what leads to personal growth and long-term happiness . . .").

²² See MARTIN E.P. SELIGMAN, AUTHENTIC HAPPINESS: USING THE NEW POSITIVE PSYCHOLOGY TO REALIZE YOUR POTENTIAL FOR LASTING FULFILLMENT 262-63 (2002).

psychologists define a meaningful life using a life span perspective, not snapshot assessments.²³

In studying human flourishing, positive psychologists contend that they are examining more than the absence of suffering.²⁴ An oft-cited example is the difference between incivility and civility.²⁵ Civility is not simply the absence of incivility; rather, civility requires positive emotions and tolerance.²⁶ Similarly, some positive psychology researchers contend that positive relationships are not the opposite of negative relationships and that the two kinds of relationships should be understood as fundamentally distinct and studied separately.²⁷

Positive psychology scholars believe that studying human flourishing is not a luxury. Even though it may be important to address first the needs of those in great pain, the failure also to study health and human strengths skews our understanding of human nature and may prevent researchers from discovering interventions that can help those who suffer.²⁸ In short, positive psychology is a forward focused field, intent on discovering and then fostering the conditions that lead to human flourishing.²⁹

Many psychology scholars who do not self-identify as positive psychologists nonetheless do work that could be characterized as the study of human flourishing. Indeed, several of the psychologists who participated in this conference, including Philip Shaver, Mark Leary, and Frank Fincham, all study positive aspects of human relationships,

²³ See George E. Valliant, *Adaptive Mental Mechanisms: Their Role in a Positive Psychology*, 55 AM. PSYCHOLOGIST 89, 91 (2000).

²⁴ As Martin Seligman has argued, traditional psychology is about bringing a person from negative five to zero by treating the disease such that a person can function, whereas positive psychology is about bringing a person from zero to positive five. See Seligman, *supra* note 22, at 262-63.

²⁵ See Martin E. P. Seligman, *Foreword: The Past and Future of Positive Psychology*, in FLOURISHING, *supra* note 7, at xvii.

²⁶ See Barbara Fredrickson, *What Good Are Positive Emotions?*, 2 REV. GEN. PSYCHOL. 300, 311 (1998). As Seligman contends, “[c]ivility moves you out of a defensive mode of arguing and into a creative, tolerant, and expansive mindset in which both parties benefit.” Seligman, *supra* note 25, at xvii.

²⁷ See Reis & Gable, *supra* note 7, at 131-32. As just one example, positive social interactions, not the absence of negative interactions, stimulate the production of oxytocin, the neuropeptide that gives an individual a rush of well-being. See *id.* at 149.

²⁸ See Corey L. Keyes & Jonathan Haidt, *Introduction: Human Flourishing—The Study of that Which Makes Life Worthwhile*, in FLOURISHING, *supra* note 7, at 3-4.

²⁹ As two scholars put it, “[p]ositive psychology aims to help people live and flourish rather than merely to exist.” *Id.* at 3.

including attachment,³⁰ forgiveness,³¹ and self-compassion.³² The work of these researchers is also highly relevant to family law, as discussed below.

B. NEGATIVE FAMILY LAW

As with the historical emphasis in psychology, family law is largely about the negative.³³ To understand this negative orientation, it is important to appreciate both the narrow and broad conceptions of family law. In the narrow sense, family law is the set of substantive and procedural rules that govern family formation and familial conflicts. Family law determines who may marry or enter a domestic partnership or civil union, and when a parent/child relationship will be recognized between an adult and a child. Family law governs familial conflicts by establishing substantive standards for the removal of children from their homes following child abuse or neglect (and possible termination of parental rights), for the voluntary relinquishment of a child for adoption, and for the award of child custody in a dispute between two parents, to name just a few areas of family law. Family law also sets procedural rules that establish how these disputes will be settled, such as through mandatory mediation and decision making by judges.

In the broad sense, family law is about the role of the law in defining family ideals and shaping family life. Some laws transparently affect family life, such as the rules governing parental leave. Other laws and state programs, such as affordable housing tax credits and public transportation subsidies, inform family life by affecting whether people

³⁰ Philip R. Shaver, *What's Love Got to Do with It?: Insecurity and Anger in Attachment Relationships*, 16 VA. J. SOC. POL'Y & L. (forthcoming 2009).

³¹ Frank Fincham, *Forgiveness: Integral to Close Relationships and Inimical to Justice?*, 16 VA. J. SOC. POL'Y & L. (forthcoming 2009).

³² See, e.g., Mark R. Leary et al., *Self-compassion and reactions to unpleasant self-relevant events: The implications of treating oneself kindly*, 92 J. PERSONALITY & SOCIAL PSYCHOL. 887, 887-88 (2007).

³³ This section draws upon my work analyzing this negative orientation of family law. See generally Clare Huntington, *Repairing Family Law*, 57 DUKE L. J. 1245, 1248, 1252 (2008) (discussing the rupture orientation of family law and noting that even the moves away from this orientation, such as mediation, collaborative law, and joint custody, are undertheorized and sometimes actively challenged) [hereinafter Huntington, *Repairing*]; Clare Huntington, *Mutual Dependency in Child Welfare*, 82 NOTRE DAME L. REV. 1485, 1497-1505 (2007) (describing the role of family autonomy in the state's failure to prevent child abuse and neglect and in its post hoc, crisis oriented approach to familial well-being) [hereinafter Huntington, *Mutual Dependency*]; Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 643-72 (2006) (exploring how child welfare law pits children's rights against parents' rights, mistakenly privileging rights in lieu of solving the problems facing families in the system) [hereinafter, Huntington, *Rights Myopia*].

are able to live and work near schools and day care centers.³⁴ Further, the law can have a profound, if not always immediately apparent, effect on familial social norms.³⁵

A negative orientation permeates both the narrow and broad senses of family law. Although family law recognizes love and attachment between intimates and between parents and children through the rules concerning family formation, these rules are binary and conflict-oriented, placing individuals in or out of the “family” and doing so in a way that often exacerbates rather than alleviates conflict.³⁶ The set of rules to resolve conflicts among family members tends to be negative because both the substance and procedure of family law often reinforce a larger sense of conflict between family members. Substantively, the state pits spouses against each other in divorce proceedings and children’s rights against parents’ rights in child welfare proceedings. Procedurally, the adversarial system looms over most disputes, particularly outside of the divorce context.

The broader conception of family law also reflects a negative orientation. The ideal of family autonomy—generally understood as the state providing minimal support for families to allow parents to raise children as they see fit—runs deep in family law. This reigning ideology turns out not to be true—in practice the state influences nearly every aspect of family life—but it has its own negative consequences. The family autonomy ideal creates the false expectation that families can and should raise children without support and that doing so serves the interests of families and the state. Family autonomy can be cast as a positive aspect of family law, giving parents the freedom to raise their children as they want. But for many families, this freedom is simply the freedom to fail. For example, the state does little to prevent conflict in families, taking a largely reactive stance to familial well-being by providing minimal support and instead expects families to take care of their own. When family members (and particularly parents) fail to do so, the state intervenes in a heavy-handed fashion, offering what are known as child protective services, ranging from support to keep a family together to the removal of a child from a home and sometimes even the

³⁴ See Katharine B. Silbaugh, *Women's Place: Urban Planning, Housing Design, and Work-Family Balance*, 76 *FORDHAM L. REV.* 1797, 1818-50 (2007) (describing “the role of urban planning and housing design in frustrating the effective balance of work and family responsibilities”).

³⁵ See Huntington, *supra* note 1 (describing the pervasive role of social norms in regulating behavior within families and further describing how laws can affect these norms).

³⁶ In addition to my own work on this topic, see *supra* note 33, see Murray, *supra* note 11, at 396-408 (describing the failure of family law to account for the web of care surrounding a child and the significant relationships between non-parental caregivers and children), 16 *Va. J. Soc. Pol'y & L.* 393 2008-2009

termination of parental rights. Short of such extreme intervention, the state misses many opportunities to help families function better, to the great detriment of both families and the state.

Another way to think about the negative orientation of family law is in terms of rupture and repair. Here, rupture refers to the breaking apart of families, sometimes voluntarily, sometimes involuntarily, for good reasons and for bad reasons. Repair is not necessarily stitching back together the family, but rather attending to the emotional aspects of family relationships—repairing relationships, even as legal relationships may change.

Family law in the narrow sense is built upon a framework of rupture, reifying conflict between intimate partners and between parents and children. This privileging of rupture starkly ignores the reality that even as formal legal relationships among family members change—from spouse to former spouse, from parent to nonparent—emotional connections between former family members typically remain.³⁷ These relationships need to be repaired such that the former family members can continue to relate to one another, as they necessarily will do.

The rupture orientation similarly pervades family law in the broad sense. Rather than recognizing the need to prevent rupture whenever possible, and that much family conflict, particularly child abuse and neglect, can be prevented with more robust, targeted support of families, family law in the broad sense is largely reactive, responding to families in crisis but doing little to support families to prevent crises. Quite simply, prevention is not the hallmark of family law, despite repeated findings that prevention programs are highly effective in both social and economic terms.³⁸

To highlight the negative orientation of family law is not to argue that family law should concern itself only with the positive side of

³⁷ In just one example, although a reader may assume that a young person who has been abused or neglected by her biological family and who will never legally return may cease feeling close to her family, a recent study of foster youth who “age out” of the foster care system documented the strong ties these young people maintain with family members, including their parents. See Mark E. Courtney et al., *Midwest Evaluation of the Adult Functioning of Former Foster Youth: Outcomes at Age 19*, 13-14 (2005) available at http://www.chapinhall.org/article_abstract.aspx?ar=1355&L2=61&L3=130 (finding that 17 percent of foster youth returned to live with their parents after being released from foster care and that “[d]espite the fact that the young adults in our study had been removed from the care of their parents, most reported feeling close to one or more members of their family of origin,” with the strongest sense of closeness to grandparents and siblings, and two-thirds feeling “somewhat close or very close” to their biological mother”).

³⁸ See *infra* Part I.C.2.

family life. Indeed, family law must continue to be alert to the real dangers that exist in families, including violence, abuse, neglect, and sexual assault. The problem with today's family law, however, is that it takes these dangers as the motivating paradigm for all laws and policies, focusing myopically on rupture without accounting for the importance of repair. What follows is an argument in favor of a well-rounded family law, one that would address the real problems in families but also try to cultivate what works best in families.

C. POSITIVE PSYCHOLOGY AS A GUIDE FOR FAMILY LAW

Just as the field of positive psychology rejects disease as the sole motivating paradigm, family law, too, can move beyond its rupture-only orientation. Although family law should always address conflict, this should not be its sum total. Family law can do far more to nurture and sustain healthy familial relationships, both to prevent rupture and to repair relationships following rupture. The field of positive psychology can help refocus family law in this direction. In particular, positive psychology, broadly defined, has the potential to provide the what, why, and how of family law. This section addresses each potential in turn, providing an overview of how positive psychology can deeply influence both the narrow and broad conceptions of family law.

1. The What of Family Law

Family law currently lacks a theoretical framework that would bring together disparate developments such as joint custody and collaborative law, create a goal for other reforms, and articulate an ideal for its overall structure. In both the narrow and broad senses, family law is largely reactive, responding to rupture after it occurs. If we want to prevent rupture as much as possible and also repair relationships after rupture, we need a new theoretical structure that articulates an ideal and provides guideposts for working toward that ideal.

Just as positive psychology identifies human flourishing as its goal, the theoretical framework of family law should be built upon the ideal of flourishing families. Rather than leaving flourishing to chance, the ideal of flourishing families means that the state, acting through family law in both its narrow and broad incarnations, seeks to help families flourish—to provide the best possible environments for their members in light of individual needs while still allowing for the tremendous pluralism that marks family life in a diverse society. This is a tall order, to be sure, but ideals *should* be ambitious.

The state, acting through both the narrow and broad conceptions of family law, will not and should not be the sum total of support for families. But family law should be predicated on the understanding that all families need support from extended family, friends, community, faith

groups, and governmental entities. By failing to recognize and support these networks, only part of which are provided by the state, family law misses multiple opportunities to help families function better. Attachment theorists document the need for a secure attachment between a caregiver and child, but there is also a need for a secure attachment between a family and its support network.³⁹ The ideal of flourishing families embraces this need and acknowledges that family law has a role to play in securing this attachment.

2. *The Why of Family Law*

The state should seek to cultivate flourishing families because such families serve important state social and economic interests. As Linda McClain has argued, families play an essential role in preparing the next generation to become engaged citizens.⁴⁰ Indeed, children who grow up in well-functioning families (defined along a variety of metrics) are more likely to become contributing citizens (again defined along a variety of metrics).⁴¹ To the extent family law can support better family functioning, it is serving this larger societal interest.

³⁹ Melissa Murray has written about the caregiving network many families use, *see supra* note 11, but here I refer to a network of support in the broadest sense possible.

⁴⁰ *See* LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 3, 17 (2006) (describing the role of families “in the project of forming persons into capable, responsible, self-governing citizens” and arguing that such “[a] formative project aims at fostering persons’ capacities for democratic . . . self-government”; “Democratic self-government connotes what democratic theorists refer to as ‘deliberative democracy’ and implicates a person’s capacity to deliberate about his or her conception of justice”); *id.* at 67-73 (arguing that close relationships between parents and their children “indirectly foster[] civic life” by cultivating a child’s capacity for autonomy and for empathy, which in turn “lay[s] the foundation for . . . their capacities for democratic and personal self-government”); *see also* Anne Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 433, 479-81 (2006) (arguing that “acquir[ing] the integrated cognitive and emotional capacities of mature reasoned thinking” is essential to participation in a deliberative democracy, and that “the integrated psychological capacities for personal self-reflection and emotional self-mastery,” which curb the “regressive compulsions, urges, and desires that can threaten to overwhelm mature ego functions,” are learned through the relationship between a very young child and her caregiver; left unchecked, these regressive impulses “threaten our democratic way of life from inside the body politic” because they can lead to a “collective regression,” which breaks down the “normal processes of collective deliberation,” such as the Japanese internment during World War II, which was a “massive failure[] in the reasoned judgment of legal decision-makers and ordinary citizens”).

⁴¹ *See, e.g.,* SHELDON BERMAN, *CHILDREN’S SOCIAL CONSCIOUSNESS AND THE DEVELOPMENT OF SOCIAL RESPONSIBILITY* 85-91 (George H. Wood ed., 1997) (arguing that modeling of altruistic and prosocial behavior by parents both

For example, through prevention programs, the state furthers family functioning, likely saving the state money in the long run and leading to better human outcomes.⁴² The Nurse-Family Partnership program, for

within and outside of family relationships fosters similar behavior in children including volunteerism and political activism); SARA McLANAHAN & GARY SANDEFUR, *GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS* 1-2, 89-91 (1994) (“Compared with teenagers of similar background who grow up with both parents at home, adolescents who have lived apart from one of their parents during some period of childhood are twice as likely to drop out of high school, twice as likely to have a child before age twenty, and one and a half times as likely to be ‘idle’—out of school and out of work—in their late teens and early twenties”; further noting that only about half of this effect can be attributed to the effects of lower income); THE NAT’L CTR. ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIV., *FAMILY MATTERS: SUBSTANCE ABUSE AND THE AMERICAN FAMILY* 27 (2005), *available at* <http://www.casacolumbia.org/absolutenm/articlefiles/380-Family%20Matters.pdf> (finding that teens who have an “excellent relationship” with one or both parents are at a lower risk for substance use and that parental praise, affection, and family bonding are also associated with a lower risk of teen substance use); KRISTIN ANDERSON MOORE & JONATHAN F. ZAFF, *CHILD TRENDS, BUILDING A BETTER TEENAGER: A SUMMARY OF “WHAT WORKS” IN ADOLESCENT DEVELOPMENT* 2 (2002), *available at* http://www.childtrends.org/Files//Child_Trends-2002_11_02_RB_BuildBetterTeens.pdf (“Teens who have warm, involved and satisfying relationships with their parents are more likely to do well in school, be academically motivated and engaged, have better social skills, and have lower rates of risky behavior than their peers”; “Teens whose parents demonstrate positive behaviors on a number of fronts are more likely to engage in those behaviors themselves and teens whose parents take part in risky behaviors are more likely to do the same”; Parents who monitor their children “in age-appropriate ways have teens with lower rates of risky physical and sexual behaviors, as well as lower rates of drug, alcohol, and tobacco use”); CATHY S. WIDOM & MICHAEL G. MAXFIELD, *NAT’L INST. OF JUSTICE, RESEARCH IN BRIEF: AN UPDATE ON THE “CYCLE OF VIOLENCE”* 1 (2001), *available at* www.ncjrs.gov/pdffiles1/nij/184894.pdf (“[B]eing abused or neglected as a child increases the likelihood of arrest as a juvenile by 59 percent, as an adult by 28 percent, and for a violent crime by 30 percent.”); COUNCIL OF ECONOMIC ADVISORS, *TEENS AND THEIR PARENTS IN THE 21ST CENTURY: AN EXAMINATION OF TRENDS IN TEEN BEHAVIOR AND THE ROLE OF PARENTAL INVOLVEMENT* 2-3 (2000), *available at* http://clinton3.nara.gov/WH/EOP/CEA/html/Teens_Paper_Final.pdf (summarizing recent research suggesting that teens who spend more time with their parents—regularly eating dinner with the family, for example—do better in school and suffer less from various forms of risk-prone conduct, such as the use of drugs and alcohol, violence, and suicidal behavior, even holding constant poverty, family structure, race, and other such factors).

⁴² See, e.g., DANIELE CHECCHI, *THE ECONOMICS OF EDUCATION: HUMAN CAPITAL, FAMILY BACKGROUND, AND INEQUALITY* 163-203 (2006) (studying investments in education in multiple countries and documenting economic return on these investments); Nestor M. Davidson, *Housing First for the*

one, has been very successful both in preventing child abuse and neglect and serving the needs of parents and children. In this program, a public health nurse visits a low-income, first-time parent during pregnancy and for the first two years of a child's life.⁴³ The nurse works closely with the mother to improve prenatal health, help parents provide more competent care to the child, and address the family's economic stability by helping

Chronically Homeless: Challenges of a New Service Model, 15 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 125, 125, 128 (2006) (noting that Housing First programs, in which the state provides housing to the chronically homeless—individuals who are often struggling with multiple problems, such as substance abuse and mental illness—without imposing any conditions on the recipient, cost far less than the “system of shelters, hospitals, mental hospitals, and incarceration that marks the cycle of life on the streets” and describing positive outcomes for clients in the areas of mental health and substance abuse); Clare Huntington, *Welfare Reform and Child Care: A Proposal for State Legislation*, 6 CORNELL J.L. & PUB. POL'Y 95, 100-05, 136-39 (1996) (describing long-term return on investments in quality child care); CHILDREN'S SENTINEL NUTRITION ASSESSMENT PROGRAM (C-SNAP), THE SAFETY NET IN ACTION: PROTECTING THE HEALTH AND NUTRITION OF YOUNG AMERICAN CHILDREN 1, 3 (2004), available at

<http://www.aecf.org/KnowledgeCenter/Publications.aspx?pubguid=%7BC8B4BACF-2DA7-4671-8C7D-63E02A43BAE8%7D> (noting that “food insecurity is associated with a greater likelihood of illnesses severe enough to warrant hospitalization for infants and toddlers,” that infants and toddlers in food-insecure households are 30 percent more likely to have a history of hospitalization, and that one pediatric hospitalization costs an average of \$11,300, whereas that same amount of money would buy food stamps for a family for almost five years). As Emily Buss describes the trade-off between paying now or paying later:

[t]he entitlement to cash assistance and medical coverage; funding for preventive services including education and job training programs, family therapy services, and drug treatment; and funding for child care are all vulnerable to congressional reduction or elimination, in the name of shrinking government and shifting responsibility for children to their parents. Ironically, one of the predictable products of this “shrinkage” will be the bloating of that very part of government that does so poorly at replacing the care, love, and authority provided by parents. A true interest in helping parents to do their job unencumbered by government intervention should inspire support for precisely the kind of public assistance that allows as many parents as possible to avoid the greatest conceivable intrusion on family autonomy—the intrusion inevitably caused by the intervention of the child welfare system.

Emily Buss, *Parents' Rights and Parents Wronged*, 57 OHIO ST. L.J. 431, 440 (1996).

⁴³ U.S. DEP'T JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, OJJDP MODEL PROGRAMS GUIDE, *Nurse-Family Partnership 1* (2006), available at modelprograms.samhsa.gov/pdfs/model/NurseFP.pdf.

parents develop and accomplish goals relating to staying in school and finding work, as well as helping parents plan subsequent pregnancies.⁴⁴ The program specifically addresses poverty-related problems, such as substance abuse.⁴⁵

The results of the program are striking. Families receiving this kind of support have a 79 percent lower incidence rate of child abuse and neglect than similarly situated families,⁴⁶ as well as numerous other benefits.⁴⁷ Moreover, it appears to be cost-effective.⁴⁸ The program costs approximately \$8,700 per family,⁴⁹ compared to the \$23.3 billion spent on the child welfare system,⁵⁰ as well as the non-economic costs associated with child abuse and neglect.⁵¹

⁴⁴ See Judith Glazner et al., *Final Report to the Administration for Children and Families, Effect of the Nurse Family Partnership on Government Expenditures for Vulnerable First-Time Mothers and their Children in Elmira, New York, Memphis, Tennessee, and Denver, Colorado* 1 (2004), available at <http://www.acf.hhs.gov/programs/opre/project/documentIndex.jsp?topics=all&startLetter=&field=&order=asc&thispage=4>; see also U.S. DEP'T JUSTICE, OJJDP MODEL PROGRAMS GUIDE, *Nurse-Family Partnership*, *supra* note 43, at 1 (describing program).

⁴⁵ See U.S. DEP'T JUSTICE, OJJDP MODEL PROGRAMS GUIDE, *Nurse-Family Partnership*, *supra* note 43, at 2.

⁴⁶ See David L. Olds, *Prenatal and Infancy Home Visiting by Nurses: From Randomized Trials to Community Replication*, 3 PREVENTION SCI. 153, 161-63 (2002) (discussing this finding in greater detail, including evidence that reductions in child abuse and neglect persisted over a fifteen year period, despite an initial up-tick following the end of the program, but that the participating families who did not experience lower rates of child abuse or neglect were those where domestic violence was present); U.S. DEP'T JUSTICE, OJJDP MODEL PROGRAMS GUIDE, *Nurse-Family Partnership*, *supra* note 43, at 5.

⁴⁷ Studies documenting the positive benefits of the program for both parents and children abound, but to give just one example, children in the visited homes had lower rates of involvement in the criminal justice system. See David Olds et al., *Long-term Effects of Nurse Home Visitation on Children's Criminal and Antisocial Behavior: 15-Year Follow-up of a Randomized Controlled Trial*, 280 JAMA 1238, 1241 (1998).

⁴⁸ I am not arguing definitively that a preventive approach will save the state money, although there are good reasons to think it will. See, e.g., Glazner et al., *Final Report*, *supra* note 44, at 11 (documenting that during the fifteen-year period following intervention, the average visited family used, in 2001 dollars, \$56,600 less in government services and paid \$8,300 more in taxes than a control group, resulting in a 393% recovery over the fifteen year period on the amount invested). My intention is to point out the economic and non-economic costs of the current system and suggest that it may save money, and certainly reduce human harm, to take a preventive approach to child welfare.

⁴⁹ See Glazner et al., *supra* note 44, at 16.

⁵⁰ See CYNTHIA ANDREWS SCARCELLA ET AL., THE COST OF PROTECTING VULNERABLE CHILDREN: THE UNDERSTANDING & STATE VARIATION IN CHILD

Similarly, early childhood education programs are known for helping children on a number of fronts, including cognitive and socio-emotional development.⁵² What is less known about these programs, however, is that they also are associated with reduced rates of child abuse and neglect, at least when the program offers services to the family as well.⁵³

For example, the Chicago School District's Child-Parent Center ("CPC") provides early childhood education to children beginning in preschool and either ending at kindergarten or continuing until third grade.⁵⁴ The program provides services to children, including health screening and free meals, and to parents, including home visits and referrals to social service agencies.⁵⁵ The program also teaches parents in separate classrooms with different teachers.⁵⁶ A study of the program found that participating families had far lower rates of child abuse and neglect than similarly situated families.⁵⁷ There is also evidence that the program is cost-effective.⁵⁸

WELFARE FINANCING v 2006), *available at*

<http://www.urban.org/publications/311314.html> (totaling spending on child welfare for fiscal year 2004 for all levels of government at \$23.3 billion).

⁵¹ See Maxine Eichner, *Children, Parents, and the State: Rethinking Relationships in the Child Welfare System*, 12 VA. J. SOC. POL'Y & L. 448, 459 (2005) (noting "the vast non-financial costs to the polity from having hundreds of thousands of its most vulnerable citizens, each of whom should be developing their capabilities to become vigorous and active citizens and productive members of society, become physically, mentally, and emotionally damaged, many of them for life, by the current system.").

⁵² See generally LYNN A. KAROLY et al., *INVESTING IN OUR CHILDREN: WHAT WE KNOW AND DON'T KNOW ABOUT THE COSTS AND BENEFITS OF EARLY CHILDHOOD INTERVENTIONS* (1998).

⁵³ See Arthur J. Reynolds & Dylan L. Robertson, *School-Based Early Intervention and Later Child Maltreatment in the Chicago Longitudinal Study*, 74 CHILD. DEVELOPMENT 3 (2003); Arthur J. Reynolds et al., *School-Based Early Intervention and Child Well-Being in the Chicago Longitudinal Study*, 82 CHILD WELFARE 633 (2003).

⁵⁴ See Reynolds & Robertson, *Later Child Maltreatment*, *supra* note 53, at 3; see also Reynolds et al., *Child Well Being*, *supra* note 53, at 633.

⁵⁵ See Reynolds & Robertson, *supra* note 53, at 3; see also Reynolds et al., *supra* note 53, at 633.

⁵⁶ See FIGHT CRIME, *NEW HOPE FOR PREVENTING CHILD ABUSE AND NEGLECT* 14 (2003) ("The parents have their own teachers and classrooms. The program also conducts home visits and offers many opportunities for parents to join in field trips or other activities with their children. All of this is aimed at helping parents to learn and practice better child-raising skills and to get them actively involved in their children's education.").

⁵⁷ The rate of child abuse and neglect among children in the preschool program was 52 percent lower than the rate in the control group. See Reynolds & Robertson, *supra* note 53, at 13-14; Reynolds et al., *supra* note 53, at 643. The results were even better for those children who stayed in the program for at least

In sum, the state relies upon well-functioning families to prepare the next generation of citizens. Embracing family flourishing as the goal of family law clarifies that the state benefits from this flourishing.

3. *The How of Family Law*

To work toward familial flourishing, family law will need to take greater heed of the importance of relationships. Positive psychology and related research provide guidance on why this is essential. One scholar has called the insight into the central role others play in our lives one of the “ten great ideas” that transcends history and culture.⁵⁹ Modern attachment theory,⁶⁰ which informs much of family law’s substantive rules around child custody and the child welfare system,⁶¹ is perhaps the best example of this insight: the relationship between a primary caregiver and a child is essential to the child’s ultimate well-being; the failure to form a secure attachment can have lasting consequences throughout a child’s life.⁶² In this way, the relationships that matter most, in a foundational sense, are familial.

Beyond attachment theory, psychological research has established more generally that humans possess a “need to belong”—a human motivation that is fundamental to existence.⁶³ Scholars have described this need as “a pervasive drive to form and maintain at least a minimum quantity of lasting, positive, and significant interpersonal relationships.”⁶⁴ This need motivates people to form bonds readily under most circumstances and to resist the dissolution of those bonds.⁶⁵ This need means that close interpersonal relationships have a strong effect on

four years. For these children, the child abuse and neglect rate was 48 percent lower than the rate for children in the program for one to four years. *See* Reynolds & Robertson, *supra* note 53, at 14.

⁵⁸ For a child who enrolls in the program for eighteen months, the program costs \$6,692 per child, including all the services to the family, and generates \$47,759 in return to society per child. *See* Reynolds at al., *supra* note 53, at 645. The return includes savings from lower rates of special education, fewer arrests, and reductions in child welfare system expenditures coupled with higher taxes paid by the students when they graduate high school. *See id.* at 644-45. The calculations do not account for any savings from preventive health care, and thus could be much higher.

⁵⁹ *See* JONATHAN HAIDT, *THE HAPPINESS HYPOTHESIS: FINDING MODERN TRUTH IN ANCIENT WISDOM* ix, 107-34 (2006) (describing the book as exploring “ten Great Ideas. . . . [each] discovered by several of the world’s civilizations”).

⁶⁰ *See* Shaver, *supra* note 30.

⁶¹ *See* Terry Maroney, *Commenting on Phil Shaver*, 16 VA. J. SOC. POL’Y & L. 471 (2009).

⁶² *See* Shaver, *supra* note 30.

⁶³ *See* Baumeister & Leary, *supra* note 9, at 497.

⁶⁴ *Id.*

⁶⁵ *See id.* at 501-03. HeinOnline -- 16 Va. J. Soc. Pol’y & L. 401 2008-2009

emotions and cognitive processes, and the lack of such relationships is correlated with ill-health and negative well-being.⁶⁶

The research from positive psychology follows this strong tradition of recognizing the importance of relationships with others. Thus, although the insight from positive psychology that “other people matter”⁶⁷ is not new, positive psychology and the related literature exploring the positive aspects of human relationships provide an excellent point of entry for thinking about flourishing families.

Recent research into effective family law interventions also demonstrates that other people matter. For example, the effectiveness of the Nurse-Family Partnership turns on the strong bond between the visiting nurse and the new mother.⁶⁸ Similarly, for children aging out of foster care (young people who typically face particularly bleak outcomes⁶⁹), a close connection with an adult is important for well-being.⁷⁰ And for at-risk children in general, the existence of a strong relationship with at least one person in the child’s life—with a friend, a member of a faith community, a teacher, or a family member—is

⁶⁶ See *id.* at 503-15.

⁶⁷ See PETERSON, *supra* note 7, at 249.

⁶⁸ See *infra* text accompanying notes 43-51, describing the program and the centrality of the relationship between the nurse and mother.

⁶⁹ See MARK E. COURTNEY ET AL., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 19 20-21, 23, 31-32, 41, 52-54, 60 (2005), *available at* http://www.chapinhall.org/article_abstract.aspx?ar=1355 (comparing a group of youth who aged out of foster care at age 18 with a nationally representative group of youth and finding that youth who age out of foster care have “significant educational deficits,” with more than 33 percent of the group not having earned a high school diploma or GED, that “their employment was often sporadic and seldom provided them with financial security,” that 25 percent were “food insecure,” and 39 percent had received need-based government benefits, that “mental health problems are more prevalent,” with “[e]xactly one-third of all the young adults ... found to have at least one ... mental health diagnosis,” that there were “notably higher lifetime prevalence rates of alcohol dependence and abuse and substance dependence and abuse, that by age 19, nearly half of the women in the sample reported that they had become pregnant, and, finally, that the youth had “a high level of criminal justice system involvement”). These challenges persisted, as a follow-up study of the same foster youth two years later demonstrated. See MARK E. COURTNEY ET AL., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 21 83-84 (2007), *available at* http://www.chapinhall.org/article_abstract.aspx?ar=1355 (finding many of the same outcomes and concluding that “these young people are faring poorly as a group”).

⁷⁰ See *id.* at 84-86 (suggesting such a connection but noting the need for further research).

strongly correlated with the child's successful development into a competent adult.⁷¹ Other examples abound.⁷²

In short, relationships are the key both to fulfilled lives and to successful interventions. And yet family law does not nurture these relationships and the networks around families as well as it could. Positive psychology provides the guideposts for developing family law, in both the narrow and broad senses, in a more positive direction. The guiding tenet should be to cultivate healthy relationships to the greatest degree possible with the resources available. Once we focus on the need to nurture and strengthen familial relationships as the ideal informing family law policy, a different kind of family law emerges.

⁷¹ See Emmy E. Werner, *Children of the Garden Island*, SCI. AM., Apr. 1989, at 106 [hereinafter Werner, *Garden Island*]. A thirty-year study of 698 infants on the Hawaiian island of Kauai demonstrated the importance of the community to such children. See *id.* at 106, 108-10; Emmy E. Werner, *High-Risk Children in Young Adulthood: A Longitudinal Study From Birth to 32 Years*, 59 AM. J. ORTHOPSYCHIATRY 72, 74 (1989) [hereinafter Werner, *High-Risk Children*]. The two principal goals of the study were "to assess the long-term consequences of prenatal and perinatal stress and to document the effects of adverse early rearing conditions on children's physical, cognitive and psychosocial development." Werner, *Garden Island*, *supra*, at 106. The study evaluated the children both during the prenatal period and then after birth at ages one, two, ten, eighteen, and thirty-two. See *id.* One-third of the children were classified as high-risk because of exposure to perinatal stress and other factors such as poverty, an uneducated parent, an alcoholic or mentally ill parent, or divorce. See *id.*; Werner, *High-Risk Children*, *supra*, at 73. Despite these stressful events, one out of three of the children in the high-risk category developed into competent, caring adults. See Werner, *Garden Island*, *supra*, at 108; Werner, *High-Risk Children*, *supra*, at 73. The research indicated that emotional support outside of the immediate family greatly contributed to their resiliency. See Werner, *Garden Island*, *supra*, at 108-10; Werner, *High-Risk Children*, *supra*, at 74. While growing up, these children had at least one close friend, they relied on kin, neighbors, teachers, or church groups for support, and they participated in extracurricular activities. See Werner, *Garden Island*, *supra*, at 108-10; Werner, *High-Risk Children*, *supra*, at 74.

⁷² To give just one, Windhorse Therapy is an innovative treatment program for individuals with mental health needs. The program creates an individual treatment plan that is built upon three basic principles: that all humans are fundamentally sane, that a healthy environment leads to a greater probability of recovery, and that recovery is discovering one's own health and sanity. See Charles Knapp, *Windhorse Therapy: Creating Whole Person Recovery Environments* (forthcoming 2009) (manuscript at 2-7, on file with author). A central part of building a positive environment around the client is to focus on building positive relationships between the client and the individuals on the treatment team. See *id.* (manuscript at 9-13).

a. Family Law, Narrowly Understood

In its narrow sense, family law should both recognize positive relationships and seek to repair emotional relationships even as legal relationships change. Beginning with recognition, family law plays an important role in facilitating engagement with others through its rules regulating entry. While this set of rules sometimes supports relationships, too often it undermines them by denying legal recognition to many committed relationships, most notably between same-sex partners. This lack of recognition leaves some committed, long-term relationships, which often produce children, without the important tangible and intangible benefits that flow from legal recognition.

When family law addresses rupture, it should seek to reduce conflict between family members, acknowledging that relationships likely will continue. Thus, marital dissolution law should pay far greater attention to the ways it currently undermines ongoing relationships between spouses who must co-parent after the divorce.⁷³ In the child welfare system, prevention should become the hallmark of the state's approach to families.⁷⁴ And in the adoption context, legal rules should recognize the emotional ties that remain even after an adoption is finalized (particularly when non-infants are adopted), thus paving the way for open adoptions and contact between adopted children and their birth parents.⁷⁵

Family law also has much to learn from positive psychology's understanding of character strengths.⁷⁶ Researchers have defined a character strength in the following manner: it must be an aspect of human character that is widely recognized in diverse cultures, contributes to individual fulfillment, is valued for itself and not what it may produce, does not diminish others, is stable and measurable, is

⁷³ See Huntington, *Repairing*, *supra* note 33, at 1275-86. This is not to argue that family law *intentionally* undermines relationships. For example, in its marital dissolution laws, family law arguably embraces the idea that complete rupture will facilitate repair by allowing each party to go separate ways, with little further entanglement. But this approach is misguided, at least for the fifty percent of divorces that involve children. There, the divorcing spouses will inevitably continue to relate to one another, and a different kind of repair is needed—one that allows a rapprochement between the soon-to-be-former spouses. Positive psychology thus demonstrates the importance of helping families move beyond rupture. If other people matter, and if continuing contact with former family members is a fact of life, family law should try to nurture repair between these former family members.

⁷⁴ See Huntington, *Mutual Dependency*, *supra* note 33, at 1520-24 (proposing a preventive approach to child well-being).

⁷⁵ See Huntington, *Repairing*, *supra* note 33, at 1303-05.

⁷⁶ For a description of the project established to classify character strengths, see Peterson, *supra* note 7, at 137-39.

obviously present in some people and absent in others, and is the subject of societal practices that try to cultivate the strength.⁷⁷ Researchers have identified six core virtues that satisfy this definition—wisdom and knowledge, courage, humanity, justice, temperance, and transcendence. Researchers have broken down these virtues into a number of character strengths, including curiosity, love of learning, authenticity, bravery, persistence, kindness, love, social intelligence, leadership, forgiveness, prudence, gratitude, hope, and humor.⁷⁸

Many of these character strengths are essential to strong relationships between romantic partners and between parents and children. Indeed, the character strengths, such as love, hope, zest, and gratitude, which researchers classify as strengths “of the heart” (as opposed to more intellectual strengths, such as love of learning), are robustly associated with fulfillment in life.⁷⁹ As one researcher concluded, “[c]haracter strengths that orient us toward others in turn make us happy.”⁸⁰ Further, researchers have found that fulfillment often comes from individuals using their own strengths of character, such as in a job that draws upon a person’s character strengths or in a relationship where character strengths are compatible.⁸¹

For example, taking the trait of forgiveness specifically (and using my terminology—“the drive for repair”⁸²), we can think about this trait in the substance, process, and practice of family law. The substantive rules of family law typically pit one individual against another, rather than asking how the family can be helped as a whole. In the child welfare system, parents’ interests are counterpoised with children’s interests, with the implicit understanding that one must prevail. In divorce law, spouses vie for children and marital assets. In paternity and maternity suits, individuals (often surrogate parents and donors of genetic material) contest parental rights to a child. The legal system rarely asks how to solve the problems facing these families and instead sets individuals against one another, competing for a limited pie.

The procedural context in which the substantive rules play out also undermines the drive for repair. For example, in a contested custody proceeding, each parent is supposed to explain why he or she is a better parent than the other. And in a child welfare proceeding, the state often testifies about the weaknesses of the parent. Additionally, the practice of family law undermines the drive for repair in important ways, with lawyers trained, and ethically obligated, to be zealous advocates for their

⁷⁷ See *id.* at 141-42.

⁷⁸ For a complete listing, see *id.* at 142-44.

⁷⁹ See *id.* at 154-55.

⁸⁰ See *id.* at 155.

⁸¹ See *id.* at 155, 159.

⁸² See Huntington, *Repairing the Drive for Repair*, *supra* note 33, at 426-43 (describing this drive).

clients, and judges and lawmakers also operating in an adversarial framework.

Reformers in family law have made some important moves away from this adversarial orientation, for example through the growing use of mediation, collaborative law, and family group conferencing.⁸³ But these reforms are decidedly undertheorized, still incomplete, and at times actively challenged.⁸⁴ Positive psychology provides the much-needed theoretical framework for incorporating repair as a normative goal in family law.

Another promising use of the research in positive psychology for family law is the work done examining resilience. Although not listed as a discrete character strength, resilience often draws upon many of these strengths and also is affected by other environmental factors.⁸⁵ Positive psychology research provides some guidance on how to cultivate this trait in individuals through support of families and education.⁸⁶ This research is also relevant to how the law might intervene in families following abuse and neglect, trying to do so in a way that enhances resilience.

To give one example of how the research into character strengths might inform family law: positive psychology may provide a useful guide for policies directed at youth development. There is an argument that the rise in undesirable behaviors by youth (substance abuse, violence, etc.) is not attributable to failing families; rather, it is linked to the absence of opportunities for youth to engage in meaningful work that gives them a sense of confidence, contribution, and meaning and also puts them in touch with adult mentors.⁸⁷ This argument resonates strongly with the finding by positive psychologists that what makes for a fulfilled life is using character strengths in a way that contributes to a greater good. Positive psychology, then, tells us we should provide youth with more opportunities to engage with and contribute to their communities. The various youth service programs—and the research

⁸³ See *id.* at 1287-93 (describing these innovations).

⁸⁴ See *id.* at 1292-93 (describing this difficulty).

⁸⁵ See Carol D. Ryff & Burton Singer, *Flourishing Under Fire: Resilience as a Prototype of Challenged Thriving*, in FLOURISHING, *supra* note 7, at 16-18 (describing various definitions of resilience, each articulating a somewhat different combination of character strengths). The authors note, importantly for my purposes, that resilience is a complex phenomenon and that there is no “silver bullet” to defining it and cultivating it. See *id.* at 19.

⁸⁶ See generally MARTIN E.P. SELIGMAN, ET AL., THE OPTIMISTIC CHILD: A PROVEN PROGRAM TO SAFEGUARD CHILDREN AGAINST DEPRESSION AND BUILD LIFELONG RESILIENCE (2007) (describing tested prevention program to increase resilience to depression among children).

⁸⁷ See STEPHANIE COONTZ, THE WAY WE REALLY ARE: COMING TO TERMS WITH AMERICA'S CHANGING FAMILIES 12-18 (1997).

finding these programs to have a positive effect on the participants⁸⁸—are examples of this approach, demonstrating how positive psychology can guide family law policy.

b. Family Law, Broadly Understood

In the broad sense, family law should recognize that family autonomy has always been a false construct. In its place, family law should embrace the mutual dependency of the state and families. The state needs families and families need the state. There are many ways the state can help families function better without infringing upon parental prerogatives. Indeed, prevention programs, which are typically voluntary and work *with* parents to help them build strengths, are far more respectful of the parental decision-making authority than back-end programs, like the child welfare system, where the state intervenes in a far more heavy-handed fashion, largely supplanting parental decision-making authority with state authority.

Moreover, the state must work with parents if it truly seeks to improve family functioning, particularly for very young children. Abundant research demonstrates that the time between birth and age three is a vitally important period of child development.⁸⁹ But the state largely cannot reach these children without engaging parents.⁹⁰ Thus, if

⁸⁸ See Nicholas Winter, *Social Capital, Civic Engagement and Positive Youth Development Outcomes* 14-20 (Edna McConnell Clark Found., 2003) available at <http://www.policystudies.com/Civic%20Engagement.pdf> (surveying current research).

⁸⁹ See, e.g., CINDY OSER & JULIE COHEN, *AMERICA'S BABIES: THE ZERO TO THREE POLICY CENTER DATA BOOK* 21-67 (2003). But see JANE WALDFOGEL, *WHAT CHILDREN NEED* 18-20 (2006) (arguing that some of the zero to three debate has exaggerated the importance of the early years, which are not “critical” in the sense that this is the only opportunity for child development, and that both the early and later years are important to child development).

⁹⁰ Let me be clear about the goal of the state’s investments. I believe the state should work toward equal opportunity, but not necessarily equal results, for families. It is up to the parents to realize this opportunity. Further, state support should not focus solely on the parent-child relationship. Prevention and long-term treatment should look at all the systems around a child. See Barbara B. Woodhouse, *Ecogenerism: An Environmentalist Approach to Protecting Endangered Children*, 12 VA. J. SOC. POL’Y & L. 409, 424 (2005) (“An ecological theory, I contrast to the child/parent/state triangle of constitutional theory . . . envisions children at the center of concentric circles of human and natural systems. Rather than proposing normative principles such as rights and duties, an ecological theory is descriptive of the world as the child knows and experiences it.”); Barbara B. Woodhouse, *Reframing the Debate About the Socialization of Children: An Environmentalist Paradigm*, 2004 U. CHI. LEGAL F. 85, 85-86 (2004). Woodhouse terms this approach “ecogenerism.” These systems range from those that directly touch the child, such as the family (immediate and extended), neighborhood, school, and peer group, to those

the state wants to help very young children during this critical developmental window, it must do so largely *through* parents.

Once parents and the state are understood as necessary partners in the cultivation of flourishing families, it is easier to work toward that goal. Prevention should inform our investments in family-oriented programs, such as early childhood education and child care, child health programs, and education more generally. To give just one example, studies have found that school readiness—the academic and nonacademic skills students possess at the beginning of kindergarten—predict later achievement.⁹¹ Thus, although formal schooling is of course important, the academic and social skills a child learns before entering school are crucial. For this reason, the state needs to engage with children, directly through early childhood education programs, and indirectly through programs that support parents.

Further, although family law supports some kinds of families, notably the nuclear family, in its hierarchy of family (parents before grandparents), and in its privileging of family autonomy rather than mutual dependence, family law fails to recognize, and thus cannot support, the larger web of care around a family.⁹² Family law should recognize and support the social, economic, spiritual, and medical networks families use for multiple purposes. Families are part of larger networks, possessing important self-determination rights, but importantly, and inevitably, dependent on others.⁹³

A focus on familial flourishing leads to reconceiving the realm of family law to take into account the role of education and land use policies in affecting the experience of families. In one simple example,

systems that are not in direct contact with the child but nonetheless influence the child, such as a parent's workplace. See Woodhouse, *Ecogenerism*, *supra* at 425-26.

⁹¹ See, e.g., Meredith Phillips et al., *Does the Black-White Test Score Gap Widen After Children Enter School*, in THE BLACK-WHITE TEST SCORE GAP 229-33 (Christopher Jencks et al., eds., Brookings Instit. Press, 1998) (finding that half of the achievement gap between white and African American students at the end of twelfth grade is attributable to school readiness in kindergarten); Vi-Nhuan Le et al., *School Readiness, Full-Day Kindergarten, and Student Achievement: An Empirical Investigation* 44-45 (RAND Corp. 2006), available at http://www.rand.org/pubs/monographs/2006/RAND_MG558.pdf (finding that nonacademic school readiness skills accounted for at least some differences in academic achievement and that “[h]ome background variables proved to be predictive of [these] skills,” and that “[t]aken together, these findings support the hypothesis that family resources are associated with nonacademic readiness skills”).

⁹² See Murray, *supra* note 11, at 390-94, 398-408.

⁹³ See MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 31-54 (2004).

the greater the “triangle” formed by workplace, home, and school/child care, and the more difficult it is to traverse the sides of the triangle, the harder it may be for a family to spend quality time together reinforcing the interpersonal relationships so necessary to group flourishing.⁹⁴ At a time when family law is increasingly federal, this reminds us that local government law—in its control over zoning, education, and transportation—also deeply affects family life.

* * *

Positive psychology provides an excellent framework for conceiving of an overarching theory of family law—that family law should regulate families in a way that contributes to flourishing families.⁹⁵ This approach would encourage individual subjective well-being, help bolster individual traits associated with flourishing, and also contribute to thriving communities. Specifically, positive psychology can provide guidance on the most difficult issues in family law: decreasing acrimony during divorce proceedings, especially where the soon-to-be-ex-spouses will be co-parents following the divorce, awarding child custody in a manner that benefits the child but also maintains the child’s relationships with both parents, addressing and effectively intervening when there is domestic violence, and identifying when children are at risk in their homes and developing effective intervention methods that, ideally, keep children safely at home without removing them and placing them into

⁹⁴ Thus, there are numerous ways the state can support flourishing families, such as through land use and public transportation measures that make it easier for people to live near work places as well as child care centers and schools. See Silbaugh, *supra* note 34, at 1818-49. As this example shows, cultivating flourishing families as a core goal of family law helps to recast ongoing debates in family law, such as how to foster a better balance between work and family commitments. Feminists have written extensively about the assumption of the American workplace that workers have no family commitments, see Silbaugh, *supra* note 34, at 1801-11 (providing an overview of this literature), and scholars have described the extraordinary difficulties this creates for adults who both work and care for dependents. See *id.* Positive psychology sheds new light on this debate because it helps explain why this tension is so destructive. Adults often must choose between engaging with work and engaging with family, but pitting one form of engagement against another undermines subjective well-being. Workplace policies that embraced workers with family responsibilities would go a long way toward defusing this tension. The state, through such measures as paid family leave, as well as individual employers, through flexible schedules and telecommuting, can facilitate engagement with work *and* family.

⁹⁵ For recent discussions of how a liberal democracy should conceive of family-state relations, see LINDA MCCLAIN, *supra* note 40; MAXINE EICHNER, FAMILY MATTERS: THE FAMILY-STATE RELATIONSHIP AND OUR LIBERAL DEMOCRATIC VALUES (forthcoming, Oxford University Press). Journal of Law, Economics, & L. 409 2008-2009

foster care. In short, positive psychology provides the guideposts most needed in family law.⁹⁶

III. CHALLENGES IN TRANSLATION

Although there is great promise in bringing together family law and positive psychology, there also are challenges. Most notably, there is a tension in joining the descriptive discipline of psychology with the prescriptive discipline of law.⁹⁷ The field of positive psychology demonstrates this difference. Positive psychology researchers have identified components of human flourishing, but their discipline does not lead them to suggest corresponding recommendations for public policy.⁹⁸ Moreover, the research itself does not provide clear-cut policy guidelines. For example, to say that close interpersonal relationships are significantly correlated with a host of positive outcomes does not tell us whether and how the state should support these relationships. As I elaborate in this Part, positive psychology research is both descriptively and normatively indeterminate.

To say that a body of research does not easily and automatically lend itself to a set of policies does not, however, mean that it is irrelevant. It

⁹⁶ As noted above, family law should continue to protect vulnerable family members. Even in this context, however, repair is still relevant: where complete rupture is the appropriate outcome for a relationship, repair is limited to internal repair rather than repairing the relationship. Additionally, even while valuing rupture, it is important to acknowledge the differences in family law cases—severe domestic violence arguably can be distinguished from so-called “situational couple violence,” and cases of child abuse and neglect can be separated into instances of poverty-related neglect and other, more severe and blame-worthy instances of abuse and neglect. See Huntington, *Repairing*, *supra* note 55, at 1312-18 (describing differentiation research in domestic violence); Huntington, *Rights Myopia*, *supra* note 33, at 668 (describing differentiation in child welfare cases). Different kinds of cases call for different kinds of responses. Simply because there has been violence or abuse in a family, the law should not automatically cement this rupture. Rather, there should be a more nuanced view of rupture and the possibility for repair.

⁹⁷ See Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1644-45 (2000). These diverging orientations are reflected in the methodology of the two disciplines: law is a generalizing methodology, whereas psychology is a particularizing methodology, focusing on detail and context to see patterns. See *id.* For an excellent discussion of the potential benefits and pitfalls of bringing scientific study into family law, see Elizabeth Mertz, *Translating Science into Family Law: An Overview*, 56 DEPAUL L. REV. 799 (2007).

⁹⁸ See PETERSON, *supra* note 7, at 15-16 (arguing that positive psychology is and should be about “description and explanation” and that “[t]he task for positive psychology is to provide the most objective facts possible about the phenomena it studies so that everyday people and society as a whole can make an informed decision about what goals to pursue in what circumstances”).

would be folly for legal scholars to ignore the growing research into human flourishing—research that is closely linked with family law. The challenge is to do so cognizant of, and accounting for, the risks. To begin that work, this Part engages with the meta-question of how to translate a descriptive science into prescriptive policy.

A. DESCRIPTIVE INDETERMINACY

Critics of positive psychology contend that both the object of measurement (happiness) and the measuring stick (self-reports) are unreliable. If true, the resulting descriptive indeterminacy would make it difficult to use positive psychology as a guide for family law.

To begin with the first contention, critics of positive psychology argue that there is no consensus on what constitutes happiness. They maintain that there are several possible definitions and that researchers do not always clarify which they mean, resulting in unreliable research findings and the failure to create a tool for evaluating public policy.⁹⁹ The possible definitions of happiness include the following: First, mental-state accounts, which are typically used by psychologists, particularly positive psychologists, and focus on a person's subjective well-being. Second, objective-list accounts, which are typically used by policymakers and list objective criteria needed for flourishing, including basic human needs and rights. Third, preference-fulfillment accounts, which are typically used by economists, who are wary about determining for others what is important in life and thus correlate well-being with a person's ability to satisfy his or her own preferences.¹⁰⁰ Critics contend that positive psychology researchers tend to conflate these three definitions, thus undermining the resulting findings.¹⁰¹

The second contention is that the findings of positive psychology are unreliable because its methodology largely relies upon surveys asking people to report on how happy or satisfied they are with their lives.¹⁰² Critics point to differences in language, which undermine cross-cultural surveys of happiness; the aggregation of diverse populations, which leads to false results for everyone; and the malleability of the questions,

⁹⁹ See Will Wilkinson, *In Pursuit of Happiness Research: Is it Reliable? What Does It Imply for Policy?*, Cato Institute Policy Analysis No. 590, Apr. 11, 2007, at 12-16 (describing this criticism, which was raised by the author and others).

¹⁰⁰ For an overview of these three approaches, see Paul Dolan & Matthew P. White, *How Can Measures of Subjective Well-Being Be Used to Inform Public Policy?*, 2 PERSP. ON PSYCHOL. SCI. 71, 71-76 (2007).

¹⁰¹ See Wilkinson, *supra* note 99, at 12-16.

¹⁰² See *id.* at 4-17. HeinOnline -- 16 Va. J. Soc. Pol'y & L. 411 2008-2009

such as asking whether a person is happy relative to his or her own past and his or her parents' past, which can dramatically alter responses.¹⁰³

Seligman acknowledges that happiness is a "scientifically unwieldy" term.¹⁰⁴ To bridge the divide between the three definitions of happiness,¹⁰⁵ he has developed the concept of "authentic happiness," which he defines as the combination of pursuing pleasurable feelings, and using character strengths in a manner that is both engaging and satisfying and also serves some greater good.¹⁰⁶ Although this definition may not be watertight, it does provide a useful way forward by clarifying what is being measured. Responding to the methodological criticism, positive psychology researchers acknowledge the concerns about self-reporting, but note that these self-reports correspond to external assessments by significant people in the person's life as well as trained observers.¹⁰⁷

In sum, although the descriptive indeterminacy concerns are not insignificant, neither are they insurmountable. With sufficient appreciation for the limits of the underlying science, it is possible to draw upon positive psychology as a guide for family law.

B. NORMATIVE INDETERMINACY

Even if the methods are sound and it is relatively clear what happiness means, positive psychology does not produce clear-cut policy answers. The findings of positive psychology are abstract—"people are fulfilled when engaging with others"—and, therefore, it is easy for these findings to become a screen onto which people project their own normative vision for the state. There are several aspects to this normative indeterminacy, and this section addresses each in turn.

1. Unclear Policy Guidance

There is an inevitable indeterminacy that flows from positive psychology's focus on subjective well-being. If interpersonal relationships are so essential to subjective well-being and thriving communities, are there any limits to which types of interpersonal relationships matter? Positive psychology might tell us that the opposite-sex requirement that forty-six states impose on couples wishing to be

¹⁰³ See *id.* at 6-9.

¹⁰⁴ U. PA., POSITIVE PSYCHOL. CTR., *Frequently Asked Questions*, <http://www.ppc.sas.upenn.edu/faqs.htm>.

¹⁰⁵ See Martin E.P. Seligman & Ed Royzman, *Happiness: The Three Traditional Theories*, U. PA. AUTHENTIC HAPPINESS NEWSL., July 2003, available at <http://www.authentichappiness.sas.upenn.edu/newsletter.aspx?id=49>.

¹⁰⁶ See SELIGMAN, *supra* note 22, at 262-63.

¹⁰⁷ See Dolan & White, *supra* note 100, at 73-74 (describing the research validating self-report surveys).

married is at odds with an interest in furthering subjective well-being because it undermines the relationships of the same-sex couples. In this way, viewing family law through a positive psychology lens might bolster arguments in favor of same-sex marriage.

But it also raises the question of whether there are bounds to state support of subjective well-being. For example, if interpersonal relationships are essential to fulfillment, and if a person feels fulfilled through an intimate relationship with more than one person, is there a reason why the state should not recognize polyamory? Does subjective well-being mean the state cannot have a view on preferred relationships?

The state has never been agnostic about family form. Historical laws concerning “illegitimate” children determined which intimate relationships would receive state favor (marital) and which would not (extramarital or nonmarital). Setting aside attestations that morality no longer informs family law,¹⁰⁸ the normative ideal for the family has not disappeared. Take any set of laws, and this ideal is discernible. Welfare laws that exclude children born while a parent is receiving aid reflect the ideal that parents should be able to care for their own children financially.¹⁰⁹ The mortgage interest deduction sends the message that families do best in a home owned by the adults.¹¹⁰ And immigration laws that recognize certain family ties but not others, and then rank those ties in order of importance (spouses before adult children; adult children before siblings), indicate which relationships matter the most in the eyes of the state.¹¹¹ In short, laws relating to the family inherently embody normative ideals.

¹⁰⁸ Cf. *Lawrence v. Texas*, 539 U.S. 558 (2003). Although we may no longer call it morality, the law certainly does embrace and reflect certain values.

¹⁰⁹ For example, in California if a child is born to a woman who has been receiving assistance for the ten previous months, the woman will not receive additional support for the child unless the pregnancy was “conceived as a result of contraceptive failure if the parent was using an intrauterine device, a Norplant, or the sterilization of either parent.” CAL. WELF. & INST. CODE § 11450.04(b)(3) (2006). There are also exceptions in that law for children conceived as the result of rape or incest. See § 11450.04(b)(1) & (2).

¹¹⁰ According to the General Accounting Office, the federal interest mortgage deduction equaled a \$61.5 billion outlay equivalent in 2004, making it the second largest tax preference outlay equivalent. See U.S. GOV’T ACCOUNTABILITY OFF., UNDERSTANDING THE TAX REFORM DEBATE: BACKGROUND, CRITERIA, & QUESTIONS at 12 (2005), available at <http://www.gao.gov/new.items/d051009sp.pdf>.

¹¹¹ See 8 U.S.C. § 1151(2)(A)(i) (2006); 8 U.S.C. § 1153(a); Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1629 (2007) (describing how “federal immigration law is family law” for noncitizens and for citizens who marry noncitizens).

Positive psychology provides some guidance for these normative choices. By documenting the importance of interpersonal relationships, we can better appreciate what is at stake in many family law debates. For example, there is an ongoing and vociferous debate in family law about whether the state should recognize and privilege a child's relationships outside the traditional nuclear family—with grandparents, with the same-sex partner of a parent, or with a long-term caregiver. With few exceptions, family law recognizes only two parents, each of whom must have a biological or legal tie to the child in order to exercise parental rights.¹¹² But for some children, a grandparent or the same-sex partner of a legal parent is an enormously important person in the child's life. To date, this debate has turned on social and political arguments, as well as assertions about what works best in legal terms. Positive psychology research may help guide this debate by providing an empirical grounding documenting the kinds of relationships that matter in life. Bringing positive psychology into family law is not going to settle difficult debates like this, but it will add a rigor and foundation to what is currently a social and political debate.

2. Malleability of Means

A second indeterminacy that arises from positive psychology concerns the potential malleability of the means to obtain the goal of subjective well-being. For example, the pro-life movement has self-consciously moved from fetal-focused arguments about human life to arguments about the well-being of women who choose to abort a fetus.¹¹³ These advocates contend that women regret the decision and suffer long-term emotional consequences.¹¹⁴ This argument persuaded a Supreme Court majority in *Gonzales v. Carhart*.¹¹⁵ Pro-choice advocates refute this claim, relying in part on findings by the American Psychological Association that abortion does not harm women's psychological well-being.¹¹⁶ Although there is certainly room for debate about which side

¹¹² See Murray, *supra* note 11, at 399 (describing “family law's tortured attempts to acknowledge the caregiving efforts of nonparental third parties such as stepparents, functional parents, and grandparents”).

¹¹³ See Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1697-1701, 1767 (2008) (describing the evolution of the “woman-protective” rationale).

¹¹⁴ See *id.*

¹¹⁵ See *Gonzales v. Carhart*, 127 U.S. 1610, 1634 (2007) (“While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained”) (citing Brief for Sandra Cano et al. *Amici Curiae*).

¹¹⁶ See AM. PSYCHOL. ASS'N, REPORT OF THE APA TASKFORCE ON MENTAL HEALTH AND ABORTION 69 (2008), available at <http://www.apa.org/releases/abortion-report.pdf>.

has better evidence, positive psychology's focus on subjective well-being opens the door to this kind of argument.

The challenge in drawing upon positive psychology, then, is to determine whether the field can help provide some guidance with contested issues in family law. A productive way forward is to try to distill some basic principles from positive psychology about relationships, which would then undergird the normative debates. This is precisely the role a legal scholar can help play—seeing patterns in research and then translating those patterns into policy. In light of their training, positive psychology researchers may not be in the best position to translate their research into public policy. Instead, legal scholars, who are steeped in public policy debates, may be in a relatively better position to do so.

Further, although positive psychology may have its limitations, current family law policies are not necessarily based on defensible psychological theories. To be sure, well-established attachment theories have informed child custody and child welfare laws,¹¹⁷ but the rules around no-fault divorce and marriage restrictions are not clearly based on established psychological theories. Instead, many family law ideals reflect historically contingent social and cultural values, rather than well-researched theories about human behavior. In other words, even if positive psychology cannot answer every question, it provides a far more rigorous basis for policymaking than the current approach of relying on political winds.

3. *Debatable Role of the State*

The third and perhaps most important aspect of indeterminacy is the ongoing debate among policymakers about how to use the findings of positive psychology. The challenge is that positive psychology findings can be manipulated to support different normative ends. The work of economist Richard Easterlin is often the starting point. Easterlin found that as absolute income levels in the United States (and other countries) have increased over time, reported happiness levels have generally remained the same.¹¹⁸ Some academics and policymakers have used this

¹¹⁷ See Maroney, *supra* note 61. See also 3 JOHN BOWLBY, ATTACHMENT AND LOSS 7–14, 397–411, (1980); 2 JOHN BOWLBY, ATTACHMENT AND LOSS 13, 245–57 (1973); 1 JOHN BOWLBY, ATTACHMENT AND LOSS 27–30, 330 (1969) (documenting the psychological and emotional trauma to a child separated unnecessarily from her parent).

¹¹⁸ See Richard A. Easterlin, *Does Economic Growth Improve the Human Lot? Some Empirical Evidence*, in NATIONS AND HOUSEHOLDS IN ECONOMIC GROWTH: ESSAYS IN HONOR OF MOSES ABRAMOVITZ 89–125 (Paul A. David & Melvin W. Reder eds., 1974); see also Ed Diener & Robert Biswas-Diener, *Will Money Increase Subjective Well-Being? A Literature Review and Guide to*

insight to argue that the state should do far more to cultivate happiness among its citizens and that simple economic growth should not be the sole focus of governmental policy.¹¹⁹ For example, the British economist Richard Layard has contended that the concept of relative position—whereby people compare themselves to others and feel worse off the lower they are on a hierarchy—should lead the government to limit the “polluting activity” of some people raising their relative income.¹²⁰ Robert Frank has made a similar argument, maintaining that the luxury arms race leaves everyone exhausted and that if the government would intervene in this race, people would have more time for pursuits that are known to lead to greater well-being, such as spending time with family and friends.¹²¹

Other policymakers argue that Easterlin’s findings should guide public policy in a completely different direction. These individuals contend that Layard-type intervention is misguided, in part because it is simply inadministrable,¹²² but more basically because high rates of

Needed Research, 57 SOC. INDICATORS RES. 119, 145-53 (2002) (reviewing research and finding that up to the \$50,000-89,000 income bracket, there are substantial increases in life satisfaction but almost no increase in life satisfaction as income climbs above this bracket). Numerous scholars have attempted to explain this finding. A few explanations in particular have taken root: (1) the “hedonic treadmill,” whereby individuals adapt to new levels of pleasure, thus returning to a point of neutrality, *see* Philip Brickman & Donald T. Campbell, *Hedonic Relativism and Planning the Good Society*, in ADAPTATION-LEVEL THEORY 289 (M.H. Appley, ed., 1971), (2) aspiration adjustment, whereby individuals adjust their aspirations once their goals have been met, *see* James G. March & Zur Shapira, *Variable Risk Preferences and the Focus of Attention*, 99 PSYCHOL. REV. 172, 177 (1992) (discussing the “rate of aspiration adjustment”) (3) relative position, whereby individuals measure their happiness relative to that of others, rather than in some absolute sense, *see* Brickman & Campbell, *supra*, at 294-95.

¹¹⁹ *See, e.g.*, Thomas D. Griffith, *Progressive Taxation and Happiness*, 45 B.C. L. REV. 1363, 1368-88 (2004) (drawing upon positive psychology research to argue in favor of progressive taxation).

¹²⁰ *See* RICHARD LAYARD, *HAPPINESS: LESSONS FROM A NEW SCIENCE* 152 (2005); *see also id.* at 152-53 (proposing, *inter alia*, that the state should impose higher taxes on income, control marketing, and ensure greater family leave). Layard is the founder and former director of the London School of Economics Centre for Economic Performance as well as a member of the House of Lords.

¹²¹ *See* ROBERT H. FRANK, *LUXURY FEVER: WHY MONEY FAILS TO SATISFY IN AN ERA OF EXCESS* 211-22 (1999).

¹²² As two scholars argue, it will be difficult if not impossible to determine the psychic damage to people lower down on the ladder such that appropriate tax levels could be established. This endeavor will necessarily entail addressing complications such as when one person’s wealth generates more envy than another person’s wealth. Then, arguably, the first person should be taxed more even if both earn the same amount. *See* Michael E. DeBow & Dwight R. Lee, *Happiness and Public Policy: A Partial Dissent*, 100 J. Soc. POL’Y 101 (2000). Why a Department of

government redistribution of income and low levels of income inequality do not make people happy.¹²³ Instead, they argue, high levels of economic freedom and high average incomes correlate with well-being.¹²⁴ With respect to relative position, critics of Layard, Frank, and others argue that although some races may be zero sum, there are always other ladders to climb, and that access to money, and the fungible nature of money, allow people to find and climb these new ladders.¹²⁵

As this one example demonstrates, positive psychology can be manipulated to support different normative ends and thus, arguably, provides only limited guidance for the formulation of policy. If the same findings support such opposing policy approaches, then the findings will provide little guidance for family law.

Rather than reject positive psychology as hopelessly indeterminate, however, it is possible to use it in a constructive manner. For example, a correlative argument in family law concerns the appropriate goal of state intervention: whether the state should take a more hands-off approach to familial well-being or be more interventionist. In the autonomy model of regulation, the state leaves families alone to make their own decisions. The state intervenes only when family members harm one another, such as when there is domestic violence or child abuse and neglect.¹²⁶ By contrast, in what I will call (somewhat tongue in cheek) the “happy families” model of state regulation, the state seeks to cultivate healthy familial relationships. The state first develops a conception of what constitutes a successful family and then attempts to advance this conception. It does so through direct legal regulation, setting the rules for entry and exit from families. It also does so through indirect regulation, promoting family ideals, subsidizing certain activities, and influencing social norms.

One way to frame the positive psychology inquiry would be to ask whether subjective well-being is furthered by the freedom to make

Homeland Happiness Would Be a Bad Idea), 22 J.L. & POL. 283, 289-90 (2006).

¹²³ See Wilkinson, *supra* note 99, at 1, 17-34. Critics maintain that people in the United States are happier than people in every European Country, with the exception of Denmark, and that studies of social spending and happiness have found no or only a very limited correlation between the two. *See id.* at 17-19. The argument continues by noting that income inequality is not correlated with happiness and that even as the income gap has widened over time, the happiness differential has narrowed. *See id.* at 20. These critics argue that what truly makes people happy is the autonomy to make decisions about life and the economic freedom to do so. *See id.* at 21-22.

¹²⁴ *See id.* at 20-22.

¹²⁵ *See id.* at 22-28.

¹²⁶ This is a change to the complete family autonomy model that used the conception of family privacy to shield family violence from state intervention.

decisions or by governmental support. But this is a fundamentally unhelpful dichotomy because the underlying dichotomy—choosing between family autonomy and governmental support—is itself false. Rather than trying to determine if autonomy or support is better for families, it is more productive to acknowledge that there simply is not a meaningful distinction between the public sphere of state regulation and the private sphere of the home, and that identifying such spheres is an inaccurate description of the relationship between the state and families.¹²⁷

The state already intervenes every day in the lives of families through small decisions, such as whether to require sidewalks in a new housing development, and large decisions, such as how to determine school assignment (neighborhood schools versus school choice versus charter schools).¹²⁸ To be sure, there are differences. The state tends to give greater deference to parenting decisions in intact, middle class, white families than it does to non-dominant families.¹²⁹ But a family

¹²⁷ See Huntington, *Mutual Dependency*, *supra* note 33, at 1512-15.

¹²⁸ To elaborate, the state determines the contours of the world in which a family lives and then permits parents to make decisions within this geography. For example, the state has decided that all children must be educated. A parent can decide where to send a child to school, even choosing to educate her at home, but a parent cannot decide to forego education altogether. (The decision in *Yoder v. Wisconsin*, 406 U.S. 205 (1972), permitted an Amish family to remove a child from school only after the age of fourteen.) Even seemingly smaller decisions made by the state, such as the sidewalk example provided in the text, affect decisions made by a family. Of course simple decisions—whether to put a child's pants on before her shirt or vice versa—are not affected by state decisions. But the state most certainly does determine whether a child wears clothes at all, and whether those clothes are adequate and appropriate in light of, for example, the weather. The state also establishes a system authorizing parents to make some decisions concerning children. Even those decisions that we perceive to be made free of state control, such as a parent deciding a course of medical treatment, are made within a decisional framework determined by the state. Parents can make these decisions because the state permits parents to make these decisions. See Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. Pa. L. Rev. 1349, 1351-52 (1982); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1504-07 (1983).

¹²⁹ See, e.g., Emily Buss, *Parental Rights*, 88 VA. L. REV. 635, 654-668 (2002) (describing Supreme Court doctrine recognizing parental rights as emerging from cases with intact families); Huntington, *Rights Myopia*, *supra* note 33, at 656-58 (describing how non-dominant families are far more likely to be involved in the child welfare system). There is also a long tradition of the state not permitting the same type of autonomy for non-dominant families. See Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L. J. 299, 328-58 (2002).

exists, at least legally, only because the state recognizes it,¹³⁰ and the state shapes almost every decision a parent makes, regardless of the socio-economic class of the family.

Similarly, just as the state regulates so much of family life, the state also provides substantial financial support to families. Public schools are perhaps the best, although also most overlooked, example of public support for families. Further, the state aids economically secure families through child care tax credits and home mortgage interest deductions, and it aids less economically stable families through subsidies for health care and early childhood education.¹³¹

There is no scenario in which state regulation and support are absent. We have traveled too far to return to a world of minimal state intervention. Would the public tolerate parents beating their children mercilessly with no state intervention? Would the public tolerate a world with no public education? Would the public tolerate a world in which poor children are not immunized against communicable diseases? I doubt it.

The relevant question, then, is not *whether* the state regulates and supports families, but rather whether the *existing* regulation and support furthers well-being, broadly defined. Positive psychology provides the needed middle ground between the competing models by clarifying that the relevant inquiry is whether the state regulates and supports families with a vision that is consistent with what positive psychology tells us about human flourishing. For example, does the \$23 billion spent annually on the child welfare system keep children safe and ensure families are not needlessly torn apart?¹³² Does the \$526 billion spent annually on public education adequately prepare children to be productive workers and members of society?¹³³ Does the \$10 billion

¹³⁰ See Eichner, *supra* note 51, at 461-63 (describing “recent feminist accounts of the family-state relationship,” which expose the complicated relationship between the state and families, such as directly determining what constitutes a family).

¹³¹ See generally JANET M. CURRIE, *THE INVISIBLE SAFETY NET: PROTECTING THE NATION’S POOR CHILDREN AND FAMILIES* 1-10, 31-43, 63-84, 125-31 (2006) (describing the importance of programs such as Head Start and arguing that the support in-kind programs provide is even more important than cash welfare programs); Dorothy E. Roberts, *Child Welfare’s Paradox*, 49 WM. & MARY L. REV. 881, 886-88 (2007) (describing the material support provided by child protective agencies and how this places recipients in a bind because the state acts as both an investigator and source of much-needed support).

¹³² See SCARCELLA ET AL., *supra* note 50, at v (totaling spending on child welfare for fiscal year 2004 for all levels of government at \$23.3 billion).

¹³³ See U.S. CENSUS BUREAU, *PUBLIC EDUCATION FINANCES 2006* at x (April 2008), available at <http://ftp2.census.gov/govs/school/06/2006pub.pdf> (totaling

spent annually on the juvenile justice system rehabilitate youth and set them on another path?¹³⁴ And does the current landscape of state regulation help families flourish?

In this way, positive psychology provides both the goal (the “what” of family law) and means (the “how” of family law). Assuming at least some level of government regulation and support of families, positive psychology provides a metric along which to conceive of well-being. Rather than the overly glib concept of happy families, positive psychology helps us think about *flourishing* families, a far more complex and meaningful concept. Bringing these insights into family law supplies a crucial, yet absent, normative basis for state support of personal relationships and guidance for the texture of the family law system. Linking positive psychology and family law allows us to conceive of a different set of rationales for both familiar and new forms of state support. It allows us to think about building institutions and structures that cultivate the conditions that lead to human flourishing and to greater subjective well-being and stronger communities.

Although embracing family flourishing would be a new goal for family law, it would not necessarily entail a new type of regulation. The state already regulates families, but does so by focusing predominantly on rupture, with little attention to repair or the prevention of rupture. The focus of the current regulation can be retrained toward the more positive goal of familial flourishing.

In other words, embracing the concept of flourishing families does not necessarily mean a massive cultural shift in how we conceive of the relationship between the state and families. In colloquial terms, the United States need not become Sweden for families to flourish. Instead, we must ask whether the current level and type of support for families helps them flourish, and whether it serves the state’s interest in efficient, cost-effective regulation. To reiterate a point made before, what is so often lost in the debate between autonomy and intervention is that many forms of state support, especially preventive measures, are far less intrusive than back-end measures. When the state offers, on a voluntary basis, a visiting nurse for a new mother at risk of abusing or neglecting her child, the state takes a vastly different posture toward that mother than when the state, after abuse or neglect has occurred, comes in and removes the child from the parent’s care. It is important to recognize that the state has many ways of regulating families that fall far short of

expenditures for programs for pre-kindergarten through 12th grade at \$526.6 billion for 2005-06).

¹³⁴ RICHARD A. MENDEL, AMERICAN YOUTH POLICY FORUM, LESS COST, MORE SAFETY: GUIDING LIGHTS FOR REFORM IN JUVENILE JUSTICE 8 (2001), *available at* <http://www.aupf.org/publications/lesscost/index.html>.

coercion and direct intervention.¹³⁵ And these less intrusive approaches are often more effective at encouraging flourishing, especially to the extent they recognize that parents, even those we often do not think of as “good” parents, have tremendous insight into the needs of their own families.¹³⁶

4. Politically Charged Context

To complicate these normative indeterminacies further, engaging in the conversation about what family law might learn from positive psychology is difficult because both family law and positive psychology are politically charged.

To elaborate, the American family has never been as uniform or as traditional as popular culture would suggest,¹³⁷ but in recent years there has been a radical transformation, both in the actual make-up of families and also in the recognition of these variations. Today, twenty-six percent of all children live with only one parent,¹³⁸ over thirty-eight percent of children are born to women who are not married,¹³⁹ and a significant

¹³⁵ In the book-length version of this project, *supra* note 4, I provide a taxonomy of the various state approaches to regulation.

¹³⁶ For example, family group conferencing is an innovative approach to solving the problems facing families in the child welfare system, bringing together family members and other individuals with a stake in the family to decide how best to support the family and keep the child safe. See Huntington, *Rights Myopia*, *supra* note 33, at 673-80 (describing the process). As one advocate of family group conferencing has explained:

[t]he relationships between all the parties, and out of which the problems have arisen, are so numerous, so ever-changing, and so interconnected that it is folly to believe that *outsiders to those relationships* could ever “know” them in a way that permits either accurate prediction or predictable intervention. The only ones who might have a chance at that are the parties themselves. For that reason . . . [i]t is *they* who must pool their perceptions of the relationships, of the problems arising within them, then search together for ways in which each of them, according to their own skills and inclinations, can make different and better contributions.

Rupert Ross, *Searching for the Roots of Conferencing*, in FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE 5, 13 (Gale Burford & Joe Hudson eds., 2000).

¹³⁷ Even in the iconic 1950s there was large variation among families. See generally STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP (1992).

¹³⁸ ROSE M. KREIDER, U.S. CENSUS BUREAU, LIVING ARRANGEMENTS OF CHILDREN: 2004 3-4 (2008).

¹³⁹ See NAT’L CENTER FOR HEALTH STAT., DEP’T OF HEALTH AND HUMAN SERVICES, NAT’L VITAL STAT. REP. VOL 57 NO. 7, BIRTHS: FINAL DATA FOR 2006 11 (Jan. 7, 2009). HeinOnline -- 16 Va. J. Soc. Pol’y & L. 421 2008-2009

number of children live in households with adults in a same-sex relationship.¹⁴⁰

Each of these changes raises its own set of normative questions that are deeply contested socially and politically. The family has become a rallying call, with numerous groups invoking it when advocating for social change (or stasis or retrenchment, depending on a person's point of view). For example, organizations like Focus on the Family and the Family Research Council advocate for policies that support and reward traditional families, and organizations like the Children's Defense Fund advocate for support to disadvantaged children regardless of family form.¹⁴¹

At heart, current debates are about contested visions of what is a good, or happy, family. For policymakers who believe gender complementarity and marriage are the bedrock for thriving families, it makes sense to deny legal recognition to same-sex couples. By contrast, for policymakers with a different stability-oriented normative ideal, it makes sense to promote same-sex marriage as a way of encouraging stable adult relationships that would redound to a child's benefit. Even stating these two policy approaches raises its own set of contested

¹⁴⁰ According to U.S. census data, in the year 2000, of the approximately 71.6 million children living in the United States, nearly 416,000 lived in a household with same-sex partners. See U.S. CENSUS BUREAU, CENSUS 2000, CHARACTERISTICS OF CHILDREN UNDER 18 YEARS BY AGE, FOR THE UNITED STATES, REGIONS, STATES, AND PUERTO RICO: 2000, PHC-T-30 (2000). There are reasons to believe, however, that the census significantly undercounts same-sex families. See David M. Smith & Gary J. Gates, *Gay and Lesbian Families in the United States: Same-Sex Unmarried Partner Households* 1-2 (Urb. Insit. 2001) (estimating that "gay and lesbian families could be undercounted as much as 62 percent") available at http://www.urban.org/UploadedPDF/1000491_gl_partner_households.pdf.

¹⁴¹ See Focus on the Family—Mission Statement, http://www.focusonthefamily.com/about_us.aspx (announcing as its mission statement, "[t]o cooperate with the Holy Spirit in sharing the Gospel of Jesus Christ with as many people as possible by nurturing and defending the God-ordained institution of the family and promoting biblical truths"); Family Research Council—Mission Statement, <http://www.frc.org/mission-statement> ("Family Research Council (FRC) champions marriage and family as the foundation of civilization, the seedbed of virtue, and the wellspring of society. FRC shapes public debate and formulates public policy that values human life and upholds the institutions of marriage and the family. Believing that God is the author of life, liberty, and the family, FRC promotes the Judeo-Christian worldview as the basis for a just, free, and stable society"); Children's Defense Fund—Mission Statement, <http://www.childrensdefense.org/who-is-cdf/> (describing its goal "to ensure every child a [h]ealthy [s]tart, a [h]ead [s]tart, a [f]air [s]tart, a [s]afe [s]tart, and a [m]oral [s]tart in life and successful passage to adulthood with the help of caring families and communities").

questions, such as whether marriage itself makes couples more stable and whether this extends to couples of the same sex.

The problem is that flourishing is susceptible to political interpretation. Do we understand flourishing as James Dobson's view of the world—that traditional families best serve the interests of family members and society?¹⁴² Or do we understand flourishing through historian and sociologist Stephanie Coontz's view that families have always come in a variety of forms and that all familial forms can work and not work?¹⁴³ In other words, even if there is agreement on the goal of family law (flourishing families), there may still be vehement disagreement about what family form is best suited to reach that goal.

Although it does not come close to the heat of the debates over the family, there is also considerable contention over positive psychology, which has its own political overtones. Critics of positive psychology often begin with the observation that those in favor of policies focused on subjective well-being are uniformly left-leaning¹⁴⁴ and seek radical redistribution of income and a larger welfare state.¹⁴⁵ In the words of one critic, what Layard calls "polluting activity" is "nothing less than your and my working hard to make more money."¹⁴⁶

There is no simple way to defuse the volatility of both family law and positive psychology. The issues touch far too many cultural, social, and political hotspots. The best we can hope for is the acknowledgment that the issues do touch these political nerves and thus any debate will be informed, at least in part, by cultural judgments. For example, where an individual stands on the choice debate in reproductive rights will almost inevitably affect that person's view of the relationship between abortion and subjective well-being. Self-awareness will not solve the problem, but it can help create a more open debate.

IV. CONCLUSION

Tolstoy famously said that "[h]appy families are all alike."¹⁴⁷ Even if this were true—and not just pabulum to set up the ensuing clause—it would still be important to know *why* families are happy. By studying

¹⁴² See Focus on the Family—Guiding Principles, http://www.focusonthefamily.com/about_us.aspx (setting forth six guiding principles, including "[t]he permanence of marriage," "[t]he value of children," "[t]he sanctity of human life," and "[t]he value of male and female").

¹⁴³ See STEPHANIE COONTZ, *THE WAY WE REALLY ARE: COMING TO TERMS WITH AMERICA'S CHANGING FAMILIES* 2-3 (1997).

¹⁴⁴ See Wilkinson, *supra* note 99, at 3.

¹⁴⁵ See *id.* at 5.

¹⁴⁶ See *id.* at 3.

¹⁴⁷ LEO TOLSTOY, *ANNA KARENINA* 1 (Leonard J. Kent & Nina Berberova eds., Constance Garnett trans., Modern Library 2000) ¶1877. HeinOnline | 118 Crim. L. & Cr. Bk. 773 2008-2009

the conditions that lead to human flourishing, positive psychology researchers, broadly defined, have gathered a wealth of empirical and qualitative studies demonstrating that a host of desirable outcomes, from personal fulfillment to civic engagement, rely upon the quality of interpersonal relationships.

In lieu of its reigning negative framework, family law can draw upon the positive psychology research to develop a new ideal for family law, a rationale for state regulation, and the means for achieving the goal—in short, the what, why and how of family law. Positive psychology helps inform the “what” of family law by providing the ideal of flourishing families, which forms the basis for a new theoretical framework for family law. Positive psychology helps inform the “why” of family law by demonstrating that the state benefits, socially and economically, when families flourish. And positive psychology helps provide the “how” of family law, not with ready policy prescriptions, but rather by offering a metric along which to measure family law’s success and also some guidance on how to reach the ideal.

There are inevitable challenges in translating a descriptive science into prescriptive policies, especially when the science itself is subject to normative cooptation. But the potential gain from drawing upon positive psychology is so great that it is well worth grappling with this indeterminacy, carefully teasing apart political debates (large versus small government, traditional versus alternative families, and so forth) from the real insights of the field. The intersection of positive psychology and family law can bring about a forward-looking model of family law that is suitable for the twenty-first century. It is time to begin that work.